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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ROSE MAGYAR, on behalf of herself and all  
others similarly situated,

Plaintiff,

v.

DELL INC., and DELL FINANCIAL  
SERVICES LLC,

Defendants.

NO. 3:12-cv-01899-H-RBB

**FIRST AMENDED COMPLAINT**

CLASS ACTION

**Jury Trial Demanded**

Honorable Marilyn L. Huff

Filed: August 1, 2012

1 Plaintiff Rose Magyar (“Plaintiff”) individually and on behalf of all others similarly  
2 situated, makes the following allegations and claims against Dell Inc. and Dell Financial  
3 Services LLC (“Defendants”), upon personal knowledge, investigation of her counsel, and on  
4 information and belief.

5 1. This action seeks redress for business practices that violate the Telephone  
6 Consumer Protection Act of 1991, 47 U.S.C. § 227, *et seq.* (“TCPA”).

7 2. The Court has jurisdiction to grant the relief sought by Plaintiff pursuant to 47  
8 U.S.C. § 227(b) and 28 U.S.C. § 1331.

9 3. Venue is proper in the district as Plaintiff resides in San Diego County and the  
10 actions which give rise to this Complaint occurred in this District.

#### 11 I. PARTIES

12 4. Plaintiff Rose Magyar is a natural person who resides in San Diego County,  
13 California, and within the Southern District of California. Plaintiff is the account holder of a  
14 cellular telephone number and pursuant to the terms of her contract is charged for each call  
15 within the meaning of 47 U.S.C. § 227(b)(1)(A)(iii).

16 5. Dell Inc. is a global information technology company that offers a broad range  
17 of computer hardware, software, and consulting services to customers including consumers,  
18 small and large businesses, as well as governments. As a regular part of its business  
19 operations, it extends credit to consumers and services those debts. It operates from its  
20 principal place of business at One Dell Way, Round Rock, Texas, 78682.

21 6. Dell Financial Services LLC is a subsidiary of Dell Inc. As a regular part of its  
22 business operations, it extends credit to consumers and services those debts. It operates from  
23 its principal place of business at One Dell Way, Round Rock, Texas, 78682.

## II. FACTS

7. Directly as well as through their subsidiaries, contractors and agents, Defendants employ hundreds of persons at various call centers throughout the country. These calling centers use automatic telephone dialing systems and computerized account information to track, record, and maintain the hundreds of thousands of accounts serviced by Defendants.

8. Part of Defendants' regular business practice is to make repeated phone calls to persons it believes responsible for paying past-due accounts.

9. On or before October 14, 2011, Defendants began calling Plaintiff on her personal cellular telephone. At no time relevant to the claims stated herein did she give consent to Defendants to call her cellular telephone using an automated telephone dialing system.

10. Over the next six weeks, Defendants placed more than one hundred calls at different times to Plaintiff's cellular telephone. Defendants frequently, though not always, left messages using an artificial or pre-recorded voice.

11. Each of the calls placed by Defendants were made by means of an automatic telephone dialing system as defined by the Federal Communications Commission.

12. In 1991, Congress enacted the TCPA in response to a growing number of consumer complaints regarding certain telemarketing and debt collection practices. The TCPA regulates, *inter alia*, the use of automated dialing systems. Specifically, section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.

13. According to findings by the Federal Communication Commission ("FCC"), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *Rules and Regulations*

1 *Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report  
2 and Order, 18 FCC Rcd 14014 (2003).

3 14. On January 4, 2008, the FCC issued a Declaratory Ruling confirming that  
4 autodialed and prerecorded message calls to a wireless number by a creditor or on behalf of a  
5 creditor are permitted only if the calls are made with the “prior express consent” of the called  
6 party. *In the Matter of Rules and Regulations Implementing the Telephone Consumer*  
7 *Protection Act of 1991* (“FCC Declaratory Ruling”), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43  
8 Communications Reg. (P&F) 877, 2008 WL65485 (F.C.C.) (2008).

9 15. The FCC “emphasize[d] that prior express consent is deemed to be granted only  
10 if the wireless number was provided by the consumer to the creditor, and that such number was  
11 provided during the transaction that resulted in the debt owed.” *FCC Declaratory Ruling*, 23  
12 F.C.C.R. at 564-65 (¶10).

13 16. Under the TCPA and pursuant to the FCC’s January 2008 Declaratory Ruling,  
14 the burden is on Defendants to demonstrate that Plaintiff gave her express consent to call her  
15 cell phone within the meaning of the statute. *See FCC Declaratory Ruling*, 23 F.C.C.R. at 565  
16 (¶ 10).

17 17. Plaintiff never gave her express consent to receive calls on her cellular  
18 telephone.

19 18. To the contrary, during several of the calls, Plaintiff clearly and unequivocally  
20 instructed Defendants and their agents to stop calling her cell phone.

21 19. On August 11, Plaintiff filed a voluntary petition seeking relief under Chapter  
22 13 of the Bankruptcy Code and amended the relevant schedules to include “Dell” as a potential  
23 creditor on August 26, 2011.

24 20. Dell was sent notice of the automatic stay and the meeting of creditors on  
25 August 25, 2011 and received that written notice shortly thereafter.

1           21.     The written notice received by Dell included instructions that all debt collection  
2 efforts relating to Plaintiff must immediately cease. Specifically, Dell was instructed that  
3 “Common examples of prohibited actions include contacting the debtor by telephone, mail or  
4 otherwise to demand repayment . . . .”

5           22.     Despite actual knowledge of Plaintiff’s bankruptcy proceedings and ignoring  
6 Plaintiff’s repeated instructions to cease contact, Defendants or an agent or contractor acting on  
7 their behalf nevertheless placed more than 100 calls to Plaintiff’s cellular telephone using an  
8 automatic telephone dialing system.

9           23.     Defendants acted willfully or knowingly or both in calling numbers using an  
10 autodialer without regard to the TCPA or whether the number was assigned to a cellular  
11 telephone.

12           24.     In calling Plaintiff on her cellular telephone lines dozens of times at multiple  
13 times per day, Defendants violated 47 U.S.C. § 227(b).

### 14                               **III. CLASS ACTION ALLEGATIONS**

15           25.     Plaintiff brings this class action pursuant to Federal Rule of Civil Procedure 23  
16 on behalf of herself and on behalf of all others similarly situated.

17           26.     The proposed Class that Plaintiff seeks to represent is defined as follows:

18                   All persons within the United States who, on or after August 1, 2008,  
19                   received an non-emergency telephone call from Defendants to a cellular  
20                   telephone through the use of an automatic telephone dialing system or an  
21                   artificial or prerecorded voice and who did not provide prior express  
22                   consent for such calls.

23           27.     Collectively, these persons will be referred to as “Class members.” Plaintiff  
24 represents, and is a member of, the Class. Excluded from the Class are Defendants and any  
25 entities in which Defendants or their subsidiaries or affiliates have a controlling interest,  
26 Defendants’ agents and employees, the judicial officer to whom this action is assigned and any  
27

1 member of the court staff and immediate family, and claims for personal injury, wrongful  
2 death, and emotional distress.

3       28. Plaintiff does not know the exact number of members in the Class, but based  
4 upon Defendants' public statements regarding their business in the United States, Plaintiff  
5 reasonably believes that Class members number at minimum in the hundred thousands. This  
6 Class size includes consumers who are borrowers on a consumer loan serviced or co-serviced  
7 by Defendants, as well as persons who co-signed for such debts; other consumer and business  
8 loans serviced by Defendants or their affiliates; persons who received telemarketing  
9 solicitations and other notices from Defendants, whether by means of a voice call or text  
10 message; and all other persons whom Defendants or their affiliates, agents, contractors, or  
11 employees dialed (or mis-dialed).

12       29. There are questions of law and fact common to the members of the Class that  
13 predominate over any questions affecting only individual members, including, whether  
14 Defendants made any call (other than a call made for emergency purposes or made with the  
15 prior express consent of the called party) using any automatic telephone dialing system or an  
16 artificial or prerecorded voice to any telephone number assigned to a paging service, cellular  
17 telephone service, specialized mobile radio service, or other radio common carrier service, or  
18 any service for which the called party is charged for the call, in violation of the TCPA.

19       30. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff  
20 has no interests antagonistic to those of the Class, and Defendants have no defenses unique to  
21 Plaintiff.

22       31. Plaintiff will fairly and adequately protect the interests of the Class, and has  
23 retained attorneys experienced in class and complex litigation.

24       32. A class action is superior to all other available methods for the fair and efficient  
25 adjudication of this controversy for the following reasons:

1           a.       It is economically impractical for members of the Class to prosecute  
2 individual actions;

3           b.       The Class is readily definable; and

4           c.       Prosecution as a class action will eliminate the possibility of repetitious  
5 litigation.

6       33.     A class action will cause an orderly and expeditious administration of the claims  
7 of the Class. Economies of time, effort, and expense will be fostered and uniformity of  
8 decisions will be ensured.

9       34.     Class wide relief is essential to compel Defendants to comply with the TCPA.  
10 The interest of Class members in individually controlling the prosecution of separate claims  
11 against Defendants is small because the statutory damages in an individual action for violation  
12 of the TCPA are small. Management of these claims is likely to present significantly fewer  
13 difficulties than are presented in many class claims because the calls at issue are all automated  
14 and the Class members, by definition, did not provide the prior express consent required under  
15 the statute to authorize calls to their cellular telephones.

16       35.     Defendants have acted on grounds generally applicable to the Class, thereby  
17 making final injunctive relief and corresponding declaratory relief with the respect to the Class  
18 First Claim for Relief

19       36.     Plaintiff re-alleges and incorporate by reference the above paragraphs as though  
20 set forth fully herein.

21       37.     The foregoing act and omissions of Defendants constitute numerous and  
22 multiple violations of the TCPA, including but not limited to each of the above-cited provisions  
23 of 47 U.S.C. § 227 *et seq.*





C. Costs of litigation and reasonable attorneys' fees; and

D. Such other and further relief as the Court may deem just and proper.

**VI. DEMAND FOR JURY**

Plaintiff demands a jury for all issues so triable.

RESPECTFULLY SUBMITTED AND DATED this 8th day of October, 2012.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on October 8, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 8th day of October, 2012.

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